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No. 83-538

In the Supreme Court of the United States

OCTOBER TERM, 1983

NOVELTIES DISTRIBUTION CORPORATION AND NEW JERSEY MANUFACTURERS INSURANCE COMPANY, PETITIONERS

v.

ANTHONY MOLEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether an employee, injured while directing the movement and placement of off-loaded lumber from the edge of a dock to a pier storage area, was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 710 F.2d 992. The opinion of the Benefits Review Board (Pet. App. 15a-20a) is unreported. The decision and order of the administrative law judge (Pet. App. 21a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1983. The petition for a writ of certiorari was filed on September 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

Section 2(4) of the LHWCA, 33 U.S.C. 902(4), provides that:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a) of the LHWCA, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this [Act] in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) * * *.

STATEMENT

Petitioner Novelties Distribution Corporation, a wholly owned subsidiary of Maher Terminals, Inc., is in the business of receiving, warehousing, and distributing lumber at a

port in Newark, New Jersey (Pet. App. 3a, 16a, 25a).[1] Novelties' lumber operation occupies two areas: Berth 78, a 10-acre area directly adjacent to the water, and a 26-acre "Bay Avenue Area," 2,500 feet inland (*id.* at 3a). When a ship is anchored at Berth 78, Maher's employees unload the lumber from the vessel onto the "stringpiece," *i.e.*, the edge of the dock closest to the ship (*id.* at 3a, 16a, 24a). Novelties' employees then place the lumber on hi-lo trucks and move it from the stringpiece to Novelties' pier storage area, where the lumber is held for consignees (*ibid.*).

Respondent Anthony Molee was employed as a checker or location man for Novelties (Pet. App. 3a, 16a, 25a). Molee spent virtually all his working time on Berth 78 (*id.* at 3a).[2] Molee's usual job was to direct the movement of lumber from the stringpiece to the storage area (*id.* at 3a, 16a, 24a-25a). Molee's "work was always checking, checking trucks, checking the lumber off the ship" (*id.* at 3a). Although Molee would sometimes work alongside the stringpiece, "any movement he may have made would end at the water's edge" (*ibid.*). On August 11, 1978, while performing his usual duties, Molee was struck by a hi-lo truck carrying lumber from the stringpiece to the storage area and was seriously injured (*id.* at 3a, 16a, 24a).

Novelties made voluntary payments to Molee under the New Jersey Workmen's Compensation Act (Pet. App. 23a). Molee then filed a claim for benefits under the Longshoremen's and Harbor Worker's Compensation Act. The administrative law judge (ALJ) approved Molee's claim (Pet. App. 24a-30a), finding that he satisfied the jurisdictional prerequisites for coverage under Sections 2(3) and 3(a) of

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[1]The other petitioner, New Jersey Manufacturers Insurance Company, is Novelties' insurance carrier.

[2]He spent, at most, one day a year at the larger area taking inventory (Pet. App. 3a).

the LHWCA, 33 U.S.C. 902(3) and 903(a). The ALJ found that Molee was injured on a "situs" covered by Section 3(a) of the Act because the injury took place in an area adjoining navigable waters that was customarily used by an employer in unloading a vessel (Pet. App. 27a-28a). Moreover, Molee satisfied the "status" requirement of Section 2(3) because he "was engaged in an intermediate step of moving cargo between the ship and land transportation," and "played an integral and essential role in the longshore process" (Pet. App. 26a). The ALJ finally determined (*id.* at 26a-27a) that Novelties was an "employer" under Section 2(4) of the Act, 33 U.S.C. 902(4), because Molee was a covered employee.[3]

Petitioners appealed the decision and order of the ALJ to the Benefits Review Board pursuant to 33 U.S.C. 921(b)(3). The Board affirmed the ALJ, finding (Pet. App. 18a-19a) that Molee was engaged in an intermediate step in the unloading process, similar to the claimants in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979).[4]

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[3]The ALJ stated (Pet. App. 27a):

> Since Claimant was engaged in maritime employment and was found to be an employee within the meaning of the Act, it follows that * * * [Novelties] was an employer under the Act, regardless of the details of organization, contract or nomenclature on which Novelties Distribution Corp., may rely to define its role in the world of commerce.

[4]The Board explained that an employee need not actually unload vessels to be covered by the LHWCA (Pet. App. 18a-19a) (citation omitted):

> Employer's employees work in concert with those of Maher Terminals in an integrated operation which combines the various steps involved in unloading a vessel and shifting cargo to the point where it is picked up for land transportation. The fact that two corporations have been formed to handle these steps does not alter the nature of the work involved. To hold otherwise would, as the administrative law judge found, reinstate the point of rest theory [rejected in *P.C. Pfeiffer*].

The court of appeals thereafter affirmed the Board (Pet. App. 1a-14a).[5] The court held that Molee was "engaged in maritime employment" within the meaning of Section 2(3) and that Novelties was an "employer" under Section 2(4) of the Act.

The court of appeals concluded that Molee was a covered "employee" under the Act regardless of Novelties' contention that Molee was employed by an agent of the lumber consignees rather than a stevedoring company (Pet. App. 4a-11a). The court of appeals observed that in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 274-279 (1977), and in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. at 75, this Court "decisively reject[ed] the 'point of rest' theory that maritime employment includes 'only the portion of the unloading process that takes place before the stevedoring gang places cargo onto the dock' " (Pet. App. 6a). The court of appeals further concluded that "[w]hether or not the Supreme Court's rejection of the point-of-rest idea is itself dispositive, the reasoning of *Caputo* and, to an even greater extent, *Ford* make clear that Molee is an employee covered by the statute because he is 'engaged in longshoring operations' " (*id.* at 7a).

The court of appeals then rejected petitioners' contention that this case is distinguishable from *Ford* because Novelties has a separate corporate identity from Maher, the stevedoring company (Pet. App. 4a-5a, 9a). The court held (*id.* at 11a-13a) that Novelties was a covered "employer" under the plain language of Section 2(4) of the Act, 33 U.S.C. 902(4). The court further noted that *Ford* makes it "clear that the test of coverage is to be simple and uniform and not manipulable at the employer's whim" because the

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[5]The Director, Office of Workers' Compensation Programs, United States Department of Labor, appeared as a party respondent in the court of appeals and filed a brief in support of Molee (Pet. App. 2a).

controlling factor is "the actual nature of the tasks performed" rather than the "employer's legal relations" (Pet. App. 9a).

ARGUMENT

The court of appeals correctly resolved the LHWCA coverage issue in this case. As the court concluded, an employee injured while directing the movement and placement of lumber from the edge of a dock to a pier storage area is engaged in an intermediate step in the maritime unloading process and satisfies the Section 2(3) status test of the LHWCA. The court also correctly held that the employer of an employee who meets the Section 2(3) status test automatically qualifies as an "employer" under Section 2(4) of the Act. The decision below does not conflict with any decision of this Court or of any other court of appeals and further review is unwarranted.

1. This case is controlled by two decisions of this Court dealing with the landward reach of the 1972 amendments to the LHWCA, *Northeast Marine Terminal Co.* v. *Caputo, supra,* and *P.C. Pfeiffer Co.* v. *Ford, supra.* In *Caputo,* 432 U.S. at 266-267 (footnote omitted), this Court examined the legislative history of the 1972 amendments and concluded that Congress "inten[ded] to cover those workers involved in the essential elements of unloading a vessel — taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." This Court held, therefore, that claimants who were injured while "engaged in the handling of cargo as it moves between ship and land transportation after its immediate unloading" were covered employees under Section 2(3) (432 U.S. at 267, 268-274). In *Ford,* 444 U.S. at 82-83 (footnote omitted), this Court similarly held that land-based workers "engaged in intermediate steps of moving cargo between ship and land transportation" were "engaged in maritime

employment" because "worker[s] responsible for some portion of that activity [are] as much an integral part of the process of loading or unloading a ship as [are] person[s] who participate[] in the entire process." [6]

Molee, a checker or location man, was injured while engaged in his normal duties of directing the movement and placement of off-loaded lumber from the stringpiece to the pier storage area. Thus, as the court of appeals correctly determined, Molee was involved in an intermediate step in the unloading process and was clearly engaged in maritime employment under Section 2(3).[7]

2. Petitioners contend (Pet. 8-14), however, that this case is distinguishable from *Caputo* and *Ford* because Novelties, although a wholly owned subsidiary of a stevedoring

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[6]As the Court explained (444 U.S. at 81) (footnote omitted):

> [T]he usual longshoring crew includes some men whose duties may be carried out solely on the land. A typical loading gang consists of persons who move cargo from a warehouse to the side of a ship, frontmen who attach the load to the ship's gear for lifting aboard the vessel, and a hold gang which stores cargo inside the ship. Although the workers who carry the cargo to shipside and the frontmen who attach the cargo to the lifting devices need not board a ship to carry out their duties, they are incontestably longshoremen directly engaged in the loading process.

[7]Petitioners contend (Pet. 17) that the court of appeals' conclusion that Molee was a "checker" is not supported by substantial evidence. The administrative law judge, however, found that "[c]laimant is a checker, or location man, whose duties are encompassed by directing the placement of lumber in Employer's pier storage area" (Pet. App. 25a). In any event, a worker's job title is not dispositive of his status as an employee under Section 2(3). Rather, "the crucial factor is the nature of the activity to which a worker may be assigned." *Ford*, 444 U.S. at 82. Molee was charged with the duty of "direct[ing] the longshoremen in the placement of [off-loaded lumber] within th[e] pier storage area" (Pet. App. 24a). He played an integral and essential part in the unloading process, and, like the claimants in *Ford*, was "engaged in [an] intermediate step[] of moving cargo between ship and land transportation" (444 U.S. at 82-83) (footnote omitted).

company, acted as the agent of land-based lumber consignees. According to petitioners, once the "consignee receives [cargo] for its own land-based purposes" the "shipment ends and the maritime nature of handling cargo terminates" (*id.* at 12). According to petitioners, Novelties is merely "a traditional lumber yard operation that happens to be located near the waterfront" (*id.* at 13). This contention is without merit.

As the court of appeals correctly observed (Pet. App. 5a), petitioners' claim is an attempt to reintroduce the checkered and arbitrary coverage that Congress sought to eliminate in the 1972 amendments by extending the coverage of the Act landward. This Court has implemented congressional intent by rejecting the "point of rest" theory, under which the landward coverage of the 1972 amendments would include only that portion of the unloading process that takes place before the cargo is placed on the dock. *Caputo*, 432 U.S. at 274-279; *Ford*, 444 U.S. at 75-76; *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 25.[8] As these cases make clear, employees who are integrally involved in the unloading process are covered under the Act, even if all their duties are performed on land. Just as coverage under the Act does not depend upon whether an employee belongs to a "maritime" or land-based union (*Ford*, 444 U.S. at 82), the rights of

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[8] In *Caputo*, 432 U.S. at 274-279, this Court explained that the "point of rest" theory was inconsistent with both the language and intent of the 1972 amendments because: (1) the theory was not mentioned in the Act or its legislative history; (2) the theory prevented a uniform compensation system by allowing workers to walk in and out of coverage depending upon on which side of the "point of rest" an employee was working; (3) the theory failed to cover longshoring operations that modern containerization techniques had moved onto land; and (4) the actual "point of rest" itself "varie[d] from port to port * * * with different types of cargo * * * [and could be] moved seaward or landward at the whim of the employer." 432 U.S. at 276 n.38.

employees under the Act cannot be defeated by an employer designating itself as a "lumberyard." As the court of appeals observed (Pet. App. 9a) (citations omitted):

> the test of coverage is to be simple and uniform and not manipulable at the employer's whim * * *. [A] test of coverage is unacceptable if it frustrates the congressional goals of simplicity and uniformity by making pivotal considerations like an employer's legal relations, rather than the actual nature of the tasks performed. If "the scope of maritime employment [does not] depend upon the vagaries of union jurisdiction," [*Ford*, 444 U.S. at 82; *Caputo*, 432 U.S. at 268 n.30] * * * it should be equally independent of changeable corporate structures, even if, as petitioners maintain, the separation between the work of Novelties' employees and those of Maher reflects a traditional division of labor in the handling of lumber.

Therefore, as the court of appeals correctly concluded (Pet. App. 5a n.2), even if Novelties were an agent of the lumber consignees, its employee, Molee, would be covered based upon the nature of the work he performed. Molee was not, as petitioner's imply (Pet. 8-14), an "employee[] whose responsibility is only to pick up stored cargo for further trans-shipment." He was, like the claimants in *Caputo* and *Ford*, involved in an intermediate step of the unloading process. See also *Warren Bros.* v. *Nelson*, 635 F.2d 552 (6th Cir. 1980) (truck driver who transported gravel from shipside to storage pile adjacent to factory found engaged in second step of unified process of unloading); *Walter Tantzen, Inc.* v. *Shaughnessy*, 624 F.2d 5 (2d Cir. 1980) (employee who opened, weighed and inspected cargo that had been unloaded from ship by longshoremen and that, following inspection, was moved to ultimate destination by

longshoremen held engaged in longshoring operations). Thus, the court of appeals properly determined that Molee was "engaged in maritime employment." [9]

3. Petitioners finally contend (Pet. 14-17) that because Molee did not in fact work over the water, Novelties is not an employer within the meaning of 33 U.S.C. 902(4). As the court of appeals observed, petitioners' argument may have had some force before the 1972 amendments, at which time the statute contained a narrow definition of employer and the term "navigable waters" did not "encompass land areas" (Pet. App. 11a). However, the 1972 amendments to the LHWCA greatly expanded the definition of the term "employer" to include "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier * * * or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. 902(4). As the court of appeals observed (Pet. App. 11a), petitioners' argument is therefore defeated by the plain language of the statute, because Molee was involved in unloading a vessel in an area customarily used by Novelties for such purposes.

Petitioners rely (Pet. 15-17) on an excerpt from the 1972 legislative history which states that an "individual employed by a person none of whose employees work, in whole

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[9] Petitioners suggest (Pet. 9-12) that the 1972 amendments reach only those employees engaged in traditional longshoring operations that were moved from vessel to land by the advent of containerization. In *Caputo*, 432 U.S. at 269-271, this Court explained that "[o]ne of the primary motivations for Congress' decision to extend the coverage shoreward was the recognition that 'the advent of modern cargo-handling techniques' had moved much of the longshoreman's work off the vessel and onto land." This Court also found, however, an intent to cover those employees who, like claimant Caputo, were "injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck" (*id.* at 271-272).

or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S. Rep. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. 92-1441, 92d Cong., 2d Sess. 11 (1972). The court of appeals correctly gave little weight to this statement, in light of its inconsistency with the plain language of the statute and the existence of other statements in the legislative history that confirm congressional intent to expand the definition of "employer" under the Act. See S. Rep. 92-1125, 92d Cong., 2d Sess. 17 (1972); H. R. Rep. 92-1441, 92d Cong., 2d Sess. 14 (1972). Although this Court has noted the "apparent inconsistency between the actual wording of section 2(4) and the expression in the legislative history" (*Perini*, slip op. 17 n.24), it did not, as petitioners imply (Pet. 15-16), suggest that the plain language of the statute should not be followed. Indeed, as the court of appeals observed (Pet. App. 12a-13a), "it would be extraordinary for a court to adopt a position which the legislative history merely appears to contemplate, rather than follow the statute's actual words." See *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *United States* v. *Oregon*, 366 U.S. 643 (1961).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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